STATE OF MICHIGAN

COURT OF APPEALS

ROBIN JOSEPH and ROBERT F. WALSH, Plaintiffs-Appellants,	UNPUBLISHED June 23, 2000
v	No. 216509 Ingham Circuit Court
DEPARTMENT OF CORRECTIONS, Defendant-Appellee.	LC No. 96-083677-NO

Before: Gage, P.J., and Gribbs and Sawyer, JJ.

PER CURIAM.

In this race discrimination and retaliation cause of action, plaintiffs appeal as of right from orders granting summary disposition for defendant pursuant to MCR 2.116(C)(8) and (10). We affirm.

This case arises out of plaintiff Joseph's claim that defendant discriminated against her because of her race and retaliated against her for voicing her concerns about racial harassment within the Department of Corrections, and plaintiff Walsh's claim that defendant retaliated against him for voicing his concerns about racial harassment within the department. On appeal, plaintiffs contend that the trial court erred as a matter of law in granting defendant's motions for summary disposition. Because the trial court analyzed evidence outside the pleadings in reaching its decision, we will address the merits of defendant's motions for summary disposition as motions brought prusuant to MCR 2.116(C)(10). This Court reviews a trial court's decision to grant or deny summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

As a threshold matter, we must clarify what claims plaintiffs alleged in their May 20, 1996, complaint against defendant. A careful review of the complaint reveals that Joseph raised two theories of liability against defendant: (1) race discrimination under the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, and (2) retaliation in violation of subsection 701(a) of the act, MCL 37.2701(a); MSA 3.548(701)(a). With respect to the discrimination theory, Joseph alleged that defendant (1) created a racially hostile work environment for her and (2) failed to promote her. With regard to her retaliation theory, Joseph alleged that defendant retaliated against her for voicing her concerns about what she perceived as racial harassment within the Department of Corrections by (1) increasing the racially hostile work environment and (2) failing to promote her. Walsh's claim alleged

retaliation in violation of subsection 701(a) of the Civil Rights Act, MCL 37.2701(a); MSA 3.548(701)(a). Walsh alleged that defendant retaliated against him for voicing his concerns about what he perceived as racial harassment within the Department of Corrections by (1) failing to promote him and (2) by creating a hostile work environment for him. With this in mind, we now address the merits of plaintiffs' arguments.

I

Plaintiff Joseph contends that the trial court erred by determining that the three-year statute of limitation, MCL 600.5805(8); MSA 27A.5808(8), barred her race discrimination and retaliation claims against defendant with regard to conduct that allegedly occurred before May 20, 1993. More specifically, Joseph contends that the "continuing violations" doctrine allowed her to bring her otherwise stale claims against defendant because the racial harassment that occurred before May 20, 1993, continued within the limitations period, or after May 20, 1993. In addition, Joseph contends that Michigan courts have not adopted a "notice" rule requiring employees to file a cause of action as soon as they become, or should become, aware of their rights. We reject both arguments.

Under the "continuing violations" doctrine, a plaintiff can bring a claim for a violation of the CRA that occurred outside the period of limitations if the violation continues within the limitation period. *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 524-527; 398 NW2d 368 (1986). The "continuing violations" doctrine consists of three distinct subtheories: (1) a policy of discrimination, (2) a continuing course of conduct, and (3) the present effects of past discrimination. *Id*. at 528.

> The first subtheory involves allegations that an employer has engaged in a continuous policy of discrimination. In such a case, the plaintiff is alleging that "he is challenging not just discriminatory conduct which has affected him, but also, or alternatively, the underlying employment system which has harmed or which threatens to harm him and other members of his class."
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> The second subtheory, the "continuing course of conduct" or "series of events" situation is relevant where an employee challenges a series of allegedly discriminatory acts which are sufficiently related so as to constitute a pattern, only one of which occurred within the limitation period.
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> The third subtheory, by all accounts, ceased to be actionable after [*United Airlines, Inc v*] *Evans* [431 US 553; 97 S Ct 1885; 52 L Ed 2d 571 (1977)]. That subtheory held that a continuing violation existed where a party suffered timely effects of injury from a past untimely act of discrimination. [*Id*. at 528 (citation omitted; footnote omitted).]

Under the first subtheory, a "policy of discrimination" exists through tangible things, such as company rules or guidelines. *Phinney v Perlmutter*, 222 Mich App 513, 547; 564 NW2d 532 (1997). Under the second subtheory, if a plaintiff asserts that a "continuing course of conduct" exists so

that the period of limitation does not bar her claim, this Court uses three factors to determine whether a "continuing course of conduct" exists:

> The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (*e.g.*, a biweekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate? [*Sumner, supra* at 538 (citations omitted).]

In this case, Joseph argues that a "continuing course of conduct" existed under the "continuing violations" doctrine. Applying the factors identified in *Sumner, supra*, we conclude that the trial court correctly concluded that a "continuing course of conduct" did not exist. Under the first factor in *Sumner*, the type and severity of the harassment that allegedly occurred before May 20, 1993, is completely different from the harassment that allegedly occurred after that date. Before May 20, 1993, defendant's employees at the Coldwater facility allegedly spit tobacco on Joseph and in her office, tracked muddy boot prints into her office, left animal entrails in her office, damaged her vehicle, threw a beer can at her husband, and yelled "nigger, go home." After May 20, 1993, Joseph can at best establish that an employee of defendant at the Jackson Clinical Complex made reference to computers and employees as "slave" and "master." This latter conduct is not the same type of discrimination that would logically connect the two periods of conduct as a continuing violation.

In addition, under the second factor of *Sumner*, the two periods of conduct allegedly occurred almost three years apart and are thus isolated incidences. Indeed, Joseph does not claim that defendant subjected her to a racially hostile work environment from April 15, 1990, to May 20, 1993.

Finally, contrary to Joseph's analysis, notice is the third factor in determining whether a "continuing course of conduct" exists under the "continuing violations" doctrine. *Id*. Under this third *Sumner* factor, the inquiry is whether the conduct has a "degree of permanence which should trigger an employee's awareness of and duty to assert his rights . . . ." *Id*. Because Joseph argues that she reported racial harassment within the department to her supervisor, Joseph must have been aware of her injuries and thus had a duty to assert her rights at that moment by filing a lawsuit. See *Rasheed v Chrysler Motors Corp*, 196 Mich App 196, 208; 493 NW2d 104 (1992), rev'd on other grounds 445 Mich 109 (1994). Therefore, the trial court correctly determined that the three-year limitation period barred Joseph's race discrimination and retaliation claims for conduct that occurred before May 20, 1993, because a "continuing course of conduct" did not exist.

II

Joseph also contends that the trial court should have considered defendant's time-barred conduct as evidence when analyzing the validity of her race and retaliation claims concerning defendant's conduct within the limitation period. In addition, Joseph contends that the trial court applied the wrong standard to Joseph's race discrimination claim because it required that the racial basis of the harassment be clear to a "reasonable person." Again, we disagree.

Not only is a claim barred by the statute of limitations, evidence of the conduct is also barred by the statute of limitations. See *Sumner*, *supra* at 543. Therefore, Joseph's argument that the trial court could have used defendant's time-barred conduct as evidence is without merit. In addition, the trial court correctly applied the standard our Supreme Court established in *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993), when determining the merits of a hostile work environment claim:

> We hold that a hostile work environment claim is actionable when the work environment is so tainted that, in the totality of the circumstances, a reasonable person in the plaintiff's position would have perceived the conduct at issue as substantially interfering with employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment. [*Id*. at 372.]

This essentially mirrors the standard the trial court used in the present case. Therefore, we conclude that the trial court did not err.

III

Plaintiffs Walsh and Joseph contend that the trial court erred in determining that they failed to establish a prima facie case of retaliation based on defendant's failure to promote them. We disagree.

To establish a prima facie case of retaliation under subsection 701(a) of the CRA, MCL 37.2701(a); MSA 3.548(701), a plaintiff must prove that (1) he engaged in a protected activity, (2) the defendant knew that he engaged in a protected activity, (3) the defendant took an adverse employment action against the plaintiff, and (4) there was a causal connection between the protected activity and the adverse employment action. *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997). To establish a causal connection between the protected activity and the adverse employment action, the plaintiff must show that his participation in the protected activity was a significant factor in the adverse employment action. *Polk v Yellow Freight System, Inc*, 801 F2d 190, 197 (CA 6, 1986). Once a plaintiff establishes a prima facie case of retaliation, the burden shifts to the defendant to articulate a legitimate business reason for the employment decision. See *Roulson v Tendercare (Michigan), Inc*, 239 Mich App 270, 280-281; ___ NW2d ___ (2000); see also *Hopkins v City of Midland*, 158 Mich App 361, 378; 404 NW2d 744 (1987). After the defendant gives a legitimate business reason for the employment decision, the burden shifts back to the plaintiff to establish that the proffered reason was not the reason, but was only a pretext for discrimination. *Id*.

In the present case, Walsh and Joseph only argue that defendant's reasons for not promoting them were pretextual. However, this Court is not required to address whether defendant's reasons were a pretext for retaliation under the burden-shifting analysis because, as the trial court correctly concluded, Walsh and Joseph both failed to first establish a prima facie case of retaliation. Although they may have established the first three elements of a prima facie case of retaliation, Walsh and Joseph failed to establish the fourth element, a causal connection between his reports of alleged racial harassment within the department and the denial of a promotion. A diverse interview panel unanimously recommended another individual for the position that Walsh and Joseph sought, and the Michigan Equal Employment and Business Opportunity Council determined that the interview panel's selection of that person was conducted in a nondiscriminatory manner. The only essential evidence that Walsh and Joseph produced at the trial level regarding the causal connection issue was a memorandum that Joseph wrote to defendant's regional health care administrator, in which he suggested that the administrator harbored a discriminatory animus. Even if that were true, Walsh and Joseph have failed to link that discriminatory animus to the denial of the promotion, much less show that it was a *significant factor* in the denial of the promotion. Therefore, we conclude that Walsh and Joseph failed to present evidence in which a reasonable factfinder would conclude that a causal connection existed between their protected activity and their adverse employment actions. *Feick v Monroe Co*, 229 Mich App 335, 344; 582 NW2d 207 (1998).

IV

Finally, Walsh notes that MCR 2.116(G)(4) requires a moving party in a motion brought pursuant to MCR 2.116(C)(10) to specifically identify the issues about which the moving party believes there are no genuine issues of material fact. Walsh contends that, because defendant's motion did not specifically address his retaliation claim based on a hostile work environment, the trial court should not have ruled on this issue. We disagree. We are satisfied that defendant's motion encompassed the hostile work environment portion of plaintiff's retaliation claim.

Affirmed.

/s/ Hilda R. Gage
/s/ Roman S. Gribbs
/s/ David H. Sawyer